

**CARL D. COURTER**  
Claimant

**EMERSON CONSTRUCTION, INC.**  
Respondent

**CONTINENTAL NATIONAL AMERICAN GROUP**  
Insurance Carrier

## ORDER

## APPEARANCES

## RECORD

## STIPULATIONS

## ISSUES

The sole issue raised by claimant in its application for review concerns the nature and extent of claimant's disability.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record and considering the arguments of the parties, the Appeals Board finds and concludes as follows:

For the reasons expressed below, the Award of the Special Administrative Law Judge should be affirmed. The claimant is entitled to a work disability and benefits should be based upon a thirty percent (30%) permanent partial general disability.

The parties stipulated that claimant sustained injury to his left shoulder and upper back on May 3, 1991. The principal issue in this proceeding is whether claimant is unable to perform, or restricted from performing, jobs falling within the medium category of work as defined by the Dictionary of Occupational Titles. There is a dispute between the physicians offering opinion testimony on this question, primarily as between Dr. Sergio Delgado and Dr. H.G. Miller. The Special Administrative Law Judge generally accepted the opinions of Dr. Delgado over those of Dr. Miller, regarding claimant's physical abilities functional impairment, and with respect to diagnosis. The 5 percent functional impairment opinion of Dr. Delgado was accepted over the 21 percent offered by Dr. Miller whose opinion included a diagnosis of reflex sympathetic dystrophy or causalgia. Dr. Delgado's opinion was considered to be the more credible as he was a treating physician as opposed to Dr. Miller who saw claimant on only one occasion at the request of claimant's attorney for the purpose of providing opinions for this litigation. In addition, Dr. Delgado treated claimant subsequent to Dr. Bailey who, in effect, declined to give an opinion as to claimant's present condition as he had apparently received considerable treatment since the date he was last seen by Dr. Bailey. Also, the Special Administrative Law Judge considered the more recent functional capacity evaluations to be the most reliable evidence of claimant's weight-handling ability. Dr. Delgado took into consideration those tests in arriving at his conclusions and, in particular, in regard to his recommendations as to physical restrictions. Dr. Bailey and Dr. Miller indicated they would defer to the most recent functional capacities testing to evaluate claimant's physical abilities and did not give opinions as to specific restrictions.

Because claimant sustained a "nonscheduled injury," he is entitled to permanent partial general benefits under the provisions of K.S.A. 1990 Supp. 44-510e. That statute provides in pertinent part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment."

The only vocational expert testimony presented on the issues of the extent to which claimant's ability to perform work in the open labor market and to earn comparable wages has been reduced was that given by Mr. Michael Dreilling. He testified that claimant was precluded from returning to his prior employment regardless of which physician's

restrictions were used. However, Mr. Dreilling offered separate opinions as to labor market and wage loss based upon certain assumptions and taking into consideration the differences in restrictions recommended by the physicians and the statements given by the claimant concerning his physical abilities and limitations. When utilizing the restrictions recommended by Dr. Delgado, Mr. Dreilling concluded that the claimant would be capable of performing work in the sedentary, light and medium strength categories. Based upon that assumption, Mr. Dreilling opined that claimant had suffered a 17 percent loss in his ability to perform work in the open labor market. He further agreed that claimant retained the ability to perform certain jobs he had performed in the past and to earn \$7.00 per hour assuming he retained the ability to perform work in the medium strength category. Claimant had earned this amount in prior employment. The Special Administrative Law Judge adopted these opinions in arriving at his finding of a 30 percent work disability.

The parties stipulated to claimant's average weekly wage being \$484.92 at the time of his accident. When compared to a current ability to earn \$7.00 per hour or \$280.00 per week, claimant has lost 42.25 percent of his ability to earn a comparable wage. The Appeals Board is not required to weigh equally the loss of access to the open labor market and loss of ability to earn a comparable wage. See Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 816 P.2d 409, rev. denied 250 Kan. 806 (1991). However, in this case there appears to be no compelling reason to give either factor greater weight. The Appeals Board, therefore, will follow the formula approved by the Supreme Court in Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990) and, by giving equal weight to both prongs of the two-part test, finds the 30 percent work disability to be reasonable and adopts the finding by the Special Administrative Law Judge as an appropriate basis for the disability award in this case.

The Appeals Board further adopts the other findings and conclusions of the Special Administrative Law Judge that are not inconsistent with those specifically set forth in this Order.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey dated August 17, 1994 should be, and hereby is, affirmed in all respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of January 1996.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Steven M. Tilton, Topeka, KS  
Gregory D. Worth, Lenexa, KS  
William F. Morrissey, Special Administrative Law Judge  
Philip S. Harness, Director